



Texas Department of Transportation

DEWITT C. GREER STATE HIGHWAY BLDG. • 125 E. 11TH STREET • AUSTIN, TEXAS 78701-2483 • (512) 463-8585

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Opinion Committee

FILE # ML-38593-96

I.D. # 38843

RQ-895

RE: ID # 38593

Ms. Susan Garrison
Assistant Attorney General
Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Dear Ms. Garrison:

Thank you for the opportunity to clarify our above-referenced opinion request on leasing highway right of way to fiber optics companies. Fiber optics companies that provide conduits for corporate subscribers are entitled to the privileges of Article 1416, V.T.C.S., which gives telegraph companies the authority to place their lines on highway right of way. *Mellon v. Southern Pacific Transport Co.*, 750 F.Supp. 226 (W.D.Tex. 1990). However, the statute does not grant free access to all portions of the right of way. The utility must exercise its authority "in such a way as not to incommode the public in the use of such roads" Utilities are located at the outer edges of the right of way so that they can be serviced without affecting the travel lanes of the roadway. Servicing lines in the median would not only be difficult from an access perspective, it would create a serious safety hazard. Accordingly, the Texas Department of Transportation's Utility Accommodation rules limit the locations in the right of way in which utility lines may be installed. See 43 TAC §21.37. Only under special circumstances not applicable here is a utility line allowed in the median of a controlled access facility.

Recently TxDOT has begun using fiber optics technology in transportation-related projects, with the fibers being run through conduits placed in the median of controlled access facilities. We have been approached by certain fiber optics companies proposing that we lease to them the extra fibers in our conduits for their own use. An alternative proposal we have received is that where the State has future plans to install fibers in its median, a fiber optics company will contract with the State to place conduits in the median at no charge, in exchange for which the company uses part of the system for its own purposes. TxDOT will receive free fibers for its purposes, and the company will maintain the system. These companies have also expressed a willingness to make lease payments to the State. The inclusion of the private use would result in no more servicing of the lines than would be necessary if TxDOT alone used the system.

We do not question whether fiber optics companies may place their conduits in what is known as the "traditional utility corridor," between the pavement and the edge of the right of way line, without charge. I have enclosed for your review copies of two memoranda to that effect from our Office of

General Counsel. However, the area in which these companies propose to place their fibers clearly does not fall within the boundaries of the right of way to which public utilities are entitled to free access.

What we would like to know, then, is whether we may allow a private use of State-owned property in this instance, either by allowing a fiber optics company to use some of our existing fibers, or by allowing them to place their fibers in an area to which their statutory authority does not extend. If such a private use is allowed, may we, or must we, charge for this use? We believe our leasing statute, §202.052 of the Transportation Code, is our sole authority for allowing a private use of the right of way. That statute requires that we charge fair market value for the lease. A further concern is whether, if we do allow a private company to use our median, we would then be required to open the area to all interested utilities. Clearly, if TxDOT were not allowed to limit access to its conduits or to the median, not all requests could reasonably be accommodated. Furthermore, any arrangement allowing for a non-highway use of federal-aid highway right of way must meet the approval of the Federal Highway Administration. Please note the enclosed letter to TxDOT from FHWA dated June 23, 1994.

If you have any further questions about this request or if you need more information, please contact Joanne Wright in our Office of General Counsel at 463-8630.

Sincerely,

A handwritten signature in black ink, appearing to read "Wm. G. Burnett", written over a horizontal line.

Wm. G. Burnett, P.E.
Executive Director

Enclosures